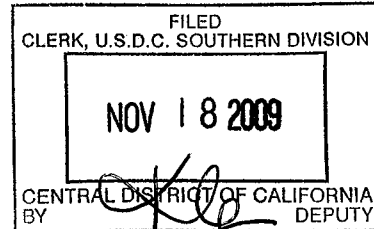


I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY
FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL *Petitioner*
(OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF
RECORD IN THIS ACTION ON THIS DATE.

DATED: 11/18/09
[Signature]
DEPUTY CLERK



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RONALD EARL LEGARDY,
Petitioner,

vs.

JAMES YATES, Warden,
Respondent.

Case No. CV 09-8367-DDP (RNB)

ORDER TO SHOW CAUSE

On November 12, 2009, petitioner lodged for filing a Petition for Writ of Habeas Corpus by a Person in State Custody herein. It appears from the face of the Petition and accompanying attachments that it is directed to the same 1991 judgment of conviction following petitioner's nolo contendere plea in Los Angeles County Superior Court Case No. A-979074 as the prior habeas petition filed by petitioner in this Court on May 7, 2008 in Case No. CV 08-2979-DDP (RNB). On September 9, 2009, Judgment was entered in Case No. CV 08-2979-DDP (RNB) dismissing the Petition without prejudice on account of petitioner's failure to exhaust state remedies.

Since this action was filed after the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") on April 24, 1996, it is subject to the AEDPA's one-year limitation period, as set forth at 28 U.S.C. § 2244(d). See Calderon v. United States District Court for the Central District of

1 California (Beeler), 128 F.3d 1283, 1287 n.3 (9th Cir. 1997), cert. denied, 522 U.S.
2 1099 and 118 S. Ct. 1389 (1998).¹ 28 U.S.C. § 2244(d) provides:

3 “(1) A 1-year period of limitation shall apply to an application
4 for a writ of habeas corpus by a person in custody pursuant to the
5 judgment of a State court. The limitation period shall run from the latest
6 of--

7 (A) the date on which the judgment became final by
8 conclusion of direct review or the expiration of the time for
9 seeking such review;

10 (B) the date on which the impediment to filing an
11 application created by State action in violation of the Constitution
12 or laws of the United States is removed, if the applicant was
13 prevented from filing by such State action;

14 (C) the date on which the constitutional right asserted
15 was initially recognized by the Supreme Court, if the right has
16 been newly recognized by the Supreme Court and made
17 retroactively applicable to cases on collateral review; or

18 (D) the date on which the factual predicate of the claim
19 or claims presented could have been discovered through the
20 exercise of due diligence.

21 (2) The time during which a properly filed application for State
22 post-conviction or other collateral review with respect to the pertinent
23 judgment or claim is pending shall not be counted toward any period of
24 limitation under this subsection.”

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27 ¹ Beeler was overruled on other grounds in Calderon v. United States
28 District Court (Kelly), 163 F.3d 530, 540 (9th Cir. 1998) (en banc), cert. denied, 526
U.S. 1060 (1999).

1 Here, it appears from the face of the Petition that petitioner failed to appeal
 2 from the judgment of conviction. Under California law in effect at the time of
 3 petitioner's conviction, an appeal had to be filed within 60 days after the rendition of
 4 the judgment. See Cal. Rules of Court, former Rule 31(a). Where the judgment of
 5 conviction was entered upon a guilty or nolo plea, the defendant was required to file
 6 a notice of intended appeal within the 60-day period, accompanied by a statement
 7 "showing reasonable constitutional, jurisdictional, or other grounds going to the
 8 legality of the proceedings"; the appeal did not become operative unless and until the
 9 trial court executed and filed a certificate of probable cause for appeal. See Cal.
 10 Rules of Court, former Rule 31(d); see also Cal. Penal Code § 1275. Consequently,
 11 "the date on which the judgment became final by conclusion of direct review or the
 12 expiration of the time for seeking such review" here was in March 1991, when
 13 petitioner's time to file an intended notice of appeal expired.

14 Since petitioner's judgment of conviction thus became final before the
 15 enactment of the AEDPA, if measured from the date on which the judgment of
 16 conviction became final,² petitioner's last day to file his federal habeas petition was
 17 April 24, 1997, unless a basis for tolling the statute existed. See Patterson v. Stewart,
 18 251 F.3d 1243, 1246 (9th Cir. 2001). No such basis appears to exist here. The only
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20 ² From the face of the Petition, it does not appear that petitioner has any
 21 basis for contending that he is entitled to a later trigger date under § 2244(d)(1)(B).
 22 Nor does it appear that petitioner has any basis for contending that he is entitled to
 23 a later trigger date under 28 U.S.C. § 2244(d)(1)(C) because the claims alleged in the
 24 Petition are based on a constitutional right that has been newly recognized by the
 25 Supreme Court and made retroactively applicable to cases on collateral review. Nor
 26 does it appear that petitioner has any basis for contending that he is entitled to a later
 27 trigger date under § 2244(b)(1)(D) since petitioner was aware of the **factual** predicate
 28 of his claims as of the date he was convicted and sentenced pursuant to his nolo plea.
See Hasan v. Galaza, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001) (statute of limitations
 begins to run when a prisoner "knows (or through diligence could discover) the
 important facts, not when the prisoner recognizes their legal significance").

1 collateral challenge listed in the Petition is a California Supreme Court habeas
2 petition that was filed on September 8, 2009. Petitioner would not be entitled to any
3 statutory tolling for that state habeas petition, since it was not filed until after
4 petitioner's federal filing deadline already had long lapsed. See, e.g., Ferguson v.
5 Palmateer, 321 F.3d 820, 823 (9th Cir.) (holding that § 2244(d) "does not permit the
6 reinitiation of the limitations period that has ended before the state petition was
7 filed," even if the state petition was timely filed), cert. denied, 540 U.S. 924 (2003);
8 Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001); Wixom v. Washington, 264 F.3d
9 894, 898-99 (9th Cir. 2001), cert. denied, 534 U.S. 1143 (2002).

10 The Court also notes that even if petitioner had a basis for contending that the
11 prior habeas petition filed by petitioner in this Court on May 7, 2008 in Case No. CV
12 08-2979-DDP (RNB) was not untimely, petitioner would not be entitled to any
13 statutory tolling for the pendency of that petition. See Duncan v. Walker, 533 U.S.
14 167, 181, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001). Thus, the one-year limitation
15 period would have lapsed during the pendency of petitioner's prior federal habeas
16 petition in any event.

17 The Ninth Circuit has held that the district court has the authority to raise the
18 statute of limitations issue *sua sponte* when untimeliness is obvious on the face of the
19 petition and to summarily dismiss a petition on that ground pursuant to Rule 4 of the
20 Rules Governing Section 2254 Cases in the United States District Courts, so long as
21 the court "provides the petitioner with adequate notice and an opportunity to
22 respond." See Nardi v. Stewart, 354 F.3d 1134, 1141 (9th Cir. 2004); Herbst v. Cook,
23 260 F.3d 1039, 1042-43 (9th Cir. 2001).

24 IT THEREFORE IS ORDERED that, on or before **December 31, 2009**,
25 petitioner show cause in writing, if any he has, why the Court should not recommend
26 that this action be dismissed with prejudice on the ground of untimeliness. If
27 petitioner intends to rely on the equitable tolling doctrine, he will need to include
28 with his response to the Order to Show Cause a declaration under penalty of perjury

1 stating facts showing (1) that he has been pursuing his rights diligently; and (2) that
2 “some extraordinary circumstance stood in his way.” See Pace v. DiGuglielmo, 544
3 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005); see also Roy v. Lampert,
4 465 F.3d 964, 969 (2006), cert. denied, 127 S. Ct. 1880 (2007); Rasberry v. Garcia,
5 448 F.3d 1150, 1153 (9th Cir. 2006); Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir.
6 2003).

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8 DATED: November 17, 2009

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12 _____
13 ROBERT N. BLOCK
14 UNITED STATES MAGISTRATE JUDGE
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